NO. 22391

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MORRIS W. LEE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

STATEMENT OF FACTS, STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

On March 16, 1962 the appellant was arrested in Long Beach, California and a complaint was issued for violation of Title 18, United States Code, Section 500. On March 28, 1962 the Federal Grand Jury for the Southern District of California returned an indictment in five counts charging appellant in Counts 1 - 4 with violations of Title 18, United States Code, Section 500, in that he had passed, uttered, and published forged postal money orders [C. T. 2-6]. 1/ On April 9, 1962 appellant was arraigned

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1/ C. T. refers to pages of Court's Transcript.

and bond was reduced to $2,500 [C. T. 7]. On April 23, 1962 defendant plead guilty to each of Counts 1 and 2 and not guilty to each of Counts 3 and 4 [C. T. 8]. The case was referred to the Probation Office for investigation and report [C. T. 8]. On May 22, 1962 the Honorable William M. Byrne, Sr., United States District Judge, sentenced appellant to five years imprisonment on each of Counts 1 and 2 to begin and run concurrently. Counts 3 and 4 were dismissed [C. T. 12 and 13]. On August 21, 1967 appellant filed a Motion for Correction of Sentence and an affidavit in forma pauperis [C. T. 14-25]. This motion was denied by the Honorable William M. Byrne, Sr., the sentencing judge, in a written order filed September 15, 1967 [C. T. 26 and 27]. On October 4, 1967 appellant filed a Notice of Appeal and Designation of Record, and Motion to Proceed in Forma Pauperis, dated September 21, 1967 [C. T. 28-33]. On October 4, 1967 Judge Byrne ordered that appellant be permitted to proceed on appeal in forma pauperis [C. T. 34].

Jurisdiction of the District Court was based on Title 18, United States Code, Sections 3231 and 500 and Rule 35 of the Federal Rules of Criminal Procedure. Jurisdiction of the court is based on Title 28, United States Code, Section 1294(1) and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

PERTINENT STATUTES

Title 18, United States Code, Section 500 provides in pertinent part:

> " . . . Whoever with intent to defraud, passes, utters or publishes, any . . . forged or altered money order or postal note, knowing any material signature . . . thereon to be false, forged or counterfeited. . . ."
>
> [shall be fined not more than $5,000 or imprisoned not more than 5 years, or both.]

Title 18, United States Code, Section 3568, as amended in 1966, provides in pertinent part:

> "The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. . . .
>
> "No sentence shall prescribe any other method of computing the term."

As amended June 22, 1966, Pub. L. 89-465,
Section 4, 80 Stat. 217.

Prior to 1966, Section 3568, as amended in 1960, provided in pertinent part as follows:

"The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: provided, that the Attorney General shall give any such person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence. . . .

"No sentence shall prescribe any other method of computing the term."

As amended September 2, 1960, Pub. L. 86-691,
Section 1(a), 74 Stat. 738.

Prior to the enactment of the above cited amendments, the statute provided in pertinent part:

"The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such

person is received at the penitentiary, reformatory, or jail for service of said sentence. . . .

"No sentence shall prescribe any other method of computing the term."

June 25, 1948, c. 645, 62 Stat. 838.

III

QUESTIONS PRESENTED

A. Whether the District Court properly denied appellant's claim for credit toward service of his sentence for the time spent in custody prior to imposition of sentence.

IV

ARGUMENT

A. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM FOR CREDIT TOWARDS SERVICE OF HIS SENTENCE FOR DAYS SPENT IN CUSTODY PRIOR TO IMPOSITION OF SENTENCE.

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1. UNDER THE 1960 AMENDMENT TO TITLE 18, UNITED STATES CODE, SECTION 3568, APPELLANT WAS NOT ENTITLED TO CREDIT FOR DAYS SPENT IN CUSTODY PRIOR TO IMPOSITION OF SENTENCE.

Prior to 1960, Title 18, United States Code, Section 3568,

provided that a sentence of imprisonment would commence to run from the date on which such person was received at the place of confinement for service of sentence.(June 25, 1948, c. 645, 62 Stat. 838.)

In 1960 the section was amended to require the Attorney General to credit a sentenced defendant for any days spent in custody prior to imposition of sentence for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence. (September 2, 1960, Pub. L. 86-691, Section 1(a), 74 Stat. 738, Emphasis added.) The Act was again amended in 1966 to require automatic administrative credit to all defendants sentenced after its effective date. (Title 18, United States Code, Section 3568, as amended June 22, 1966, Pub. L. 89-465, Section 4, 80 Stat. 217.)

Appellant was sentenced in 1962. He does not contend, nor does the law provide, that the 1966 amendment applies retroactively. Stapf v. United States, 367 F. 2d 326, 329 (D. C. Cir. 1966). However, appellant asserts that on the authority of Stapf, supra, and Dunn v. United States, 376 F. 2d 191 (4th Cir. 1967), he is entitled to administrative credit for time served prior to sentencing even though he had "bail set" while in custody and even though he was not charged or sentenced pursuant to a statute which required "the imposition of a minimum mandatory sentence." 2/

2/ See also United States v. Smith, 379 F. 2d 628 (7th Cir. 1967).

The Stapf court reasoned that there was no legitimate basis for a classification requiring credit for pre-sentence custody for lack of bail as to a minimum term offense but unavailable in less serious offenses not punishable by a minimum mandatory sentence. The court also rationalized, without citation, that the Congress enacting the 1960 amendment made no provision for defendants sentenced for offenses not carrying mandatory minimum terms of imprisonment because it assumed that sentencing courts had been providing, and would continue to provide, credit for pre-sentence custody. (Citing Congressional hearings held long after 1960; Stapf, supra, at page 329, Footnotes 7 and 8.)

A contrary view has been expressed in other circuits. Sawyer v. United States, 376 F.2d 615 (8th Cir. 1967); Schreter v. United States, 265 F. Supp. 369 (D.C.N.J., 1967); Allen v. United States, 264 F. Supp. 420 (D.C.M.D.Pa., 1966). See also Amato v. United States, 374 F.2d 37 (3rd Cir., 1967); Scott v. United States, 326 F.2d 343 (8th Cir. 1964); Powers v. Taylor, 327 F.2d 498 (10th Cir. 1964); United States v. Abele, 269 F. Supp. 29 (E.D. La., 1967); Joseph v. United States (U.S.D.C. E.D. Louisiana), 272 F. Supp. 687 (1967).

The appellee contends that the plain, simple and unambiguous language of the 1960 amendment defies resort to judicial construction. Sawyer v. United States, supra, page 618. As pointed out in Sawyer, the legislative history of the 1960 amendment clearly shows that the purpose of Congress was the allowance of credit for time spent in custody for want of bail set where the

sentence was imposed under a statute requiring a minimum mandatory sentence. Id. at page 617, Footnote 2. Moreover, the arbitrary classification found by the Stapf court simply does not exist where one views the statutory classification as an expression of Congressional intent to require credit for pre-sentence custody time in mandatory minimum cases where the sentencing court has no discretion in the matter of sentence to set the term below the mandatory minimum. The Congressional intent may well have been to leave the matter of credit for pre-sentence custody to the discretion of the sentencing court in cases where the court could exercise complete discretion as to sentence.

B. THE SENTENCING COURT MAY NOT BE COMPELLED AT A LATER DATE TO GRANT CREDIT FOR THE TIME THAT APPELLANT SPENT IN CUSTODY PRIOR TO THE IMPOSITION OF SENTENCE WHERE IT IS POSSIBLE THAT THE COURT TOOK INTO CONSIDERATION SUCH CUSTODY TIME WHEN IT ORIGINALLY IMPOSED SENTENCE.

It is clear that the appellant in this case did not receive the maximum sentence since the two five year terms were ordered to run concurrently each with the other instead of consecutively. Title 18, United States Code, Section 500; Sawyer v. United States, 376 F. 2d 615 (8th Cir. 1967); United States v. Deaton, 364 F. 2d 820 (6th Cir. 1966), cert. den. 87 S. Ct. 1173, 386 U. S. 977, 18 L. Ed. 2d 138; Doelle v. United States, 301 F. 2d 293 (7th Cir. 1962).

It is also apparent from the record that the judge who denied petitioner's claim pursuant to Rule 35, Federal Rules of Criminal Procedure, was the same judge who sentenced the petitioner [C. T. 12, 26 and 27]. The written order denying the motion shows that the judge was aware of the fact that he was imposing less than the maximum sentence [C. T. 26]. Even assuming arguendo the validity of Stapf and Dunn, supra, these holdings are not applicable where the appellant was not sentenced to the maximum term by the sentencing court and it was therefore possible that the sentencing court considered prior custody in imposing sentence. Indeed, the Stapf court ruled that "wherever possible, as a matter of mechanical calculation, that credit could have been given, we will conclusively presume it was given." Id. at page 330. The court noted expressly that its decision was not equivalent, either in intent or effect, to a retroactive application of the 1966 amendment.

Appellant's claim for credit must be denied, where, as here, the sentence was less than the maximum; the judge who denied the request is the judge who imposed the sentence originally; and the sentence was imposed long before the effective date of the 1966 amendment to Section 3568. Amato v. United States, 374 F. 2d 36 (3rd Cir. 1967); United States v. Deaton, supra; Schreter v. United States, 265 F. Supp. 369 (1967).

V

CONCLUSION

Since appellant is not entitled to automatic credit for time served in custody prior to the imposition of sentence, the order denying the Motion to Correct Sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael D. Nasatir
MICHAEL D. NASATIR